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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 79

LEHIGH VALLEY COOPERATIVE FARMERS, INC. AND SUNCREST FARMS, INC., *Petitioners*

v.

UNITED STATES OF AMERICA AND ORVILLE L. FREEMAN, Secretary of Agriculture, *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE, AND BRIEF FOR THE LAWSON MILK COMPANY

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MOTION OF THE LAWSON MILK COMPANY FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 42 (3), the Lawson Milk Company, an Ohio corporation, moves this court for leave to file a brief amicus curiae urging reversal of the Third Circuit Court of Appeals decision and affirmance of the

District Court. The petitioners consent to the filing of such brief. Respondents refused such consent. The interest of the applicant and the reasons for this motion are as follows:

1. APPLICANT'S CASE. Applicant is plaintiff-appellant in an action now pending in the United States Court of Appeals for the Sixth Circuit titled *Lawson Milk Company* v. *Freeman*, No. 14,410, reported in the District Court as *Lawson Milk Company* v. *Benson*, 187 F. Supp. 66, and in the Department of Agriculture as *In re the Lawson Milk Company*, April 1958, 17 A.D. 239, 597.

Applicant's case (hereafter the *Lawson* case) challenges the legality of penalty payment provisions in the Cleveland Milk Order similar to those in the New York Milk Order challenged here (the *Lehigh* case).

The similarity of *Lawson* to *Lehigh* has been frequently noted in the latter in its course through the Department of Agriculture, *In re Lehigh Valley Cooperative Farmers, Inc.*, February 1959, 18 A.D. 75; *In re Sunset Farms, Inc.*, March 1959, 18 A.D. 191, and in the opinion of the Third Circuit, *U. S.* v. *Lehigh Valley Cooperative Farmers, Inc.*, 287 F. 2d 726. The similarity and comparison has also been noted in the opinion of the District Court in *Lawson*, *supra*, and in other opinions of the Department of Agriculture, *In re Chapman Dairy*, April 1959, 18 A.D. 323, *In re Grocer's Dairy Company*, 18 A.D. 995, *In re Knudsen Brothers Dairy, Inc.*, 18 A.D. 1333, (since reversed by the District Court in *Knudsen Bros.* v. *Benson*, now on appeal to the Second Circuit, No. 26698).

While the same basic question is presented in both cases—the domestic tariff walls in the national milk

market being erected through the penalty payment device—*Lawson* presents the question in a somewhat more typical aspects and less sophisticated context.

2. CURRENT STATUS OF APPLICANT'S CASE. When *Lehigh* was decided by the Third Circuit, applicant moved the Sixth Circuit, where its case was pending, for leave to petition for certiorari before judgment. The Government did not consent and the motion was denied by the court. However, being advised that a petition for certiorari would be filed in the *Lehigh* case, it accepted the suggestion of the Government and stayed further proceedings in *Lawson* pending the outcome of *Lehigh*. This order is still in effect.

3. DISCUSSION OF APPLICANT'S CASE HERE. Briefs filed herein by the petitioners, and by the State of Minnesota, amicus curiae supporting petitioners, do not make reference to the *Lawson* case. However, briefs of the Government make repeated references to *Lawson* as do briefs amicus filed in support of the Government by the States of Vermont, Connecticut, and New Jersey, and by the multitudinous interests of Dairymen's League Cooperative Association, Inc., et al. Only the amicus brief of the State of New York omits mention of it.

4. A MORE BALANCED PORTRAYAL NEEDED. While it would seem that the Court already has a host of friends advising it with respect to applicant's case, all of its advisors are on respondents' side of the question. Respondents and their many supporters are perhaps correct in thus attaching importance to applicant's case. The somewhat different aspect and context in which it presents the same basic question here involved does serve to illuminate that basic question. But the illu-

nination will be more balanced if the light comes from more than one direction.

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BRIEF OF THE LAWSON MILK COMPANY AMICUS CURIAE

INTEREST OF LAWSON MILK COMPANY

The Lawson Milk Company is plaintiff-appellant in a similar case now pending before the Sixth Circuit, reported in the District Court as *Lawson Milk Company* v. *Benson*, 187 F. Supp. 66, and in the De-

partment of Agriculture as *In re the Lawson Milk Company*, 1958, 17 A.D. 239, 597.

ARGUMENT

The similarities between the *Lawson* case and the present *Lehigh* case have been frequently noted in discussions of the latter. The similarities need not be belabored here. It is sufficient to say that both cases present the same basic question:

> Whether domestic tariff walls are being buttressed in the national milk market through the medium of penalty payment provisions in Federal Milk Orders. Those in the New York Milk Market are challenged here in the *Lehigh* case and those in the Cleveland Milk Order are being challenged by this amicus in the *Lawson* case.

Here this amicus will discuss the basic question in the light of the more typical aspect and less sophisticated context in which it is presented in the *Lawson* case. In doing so, this amicus will emphasize the differences between *Lehigh* and *Lawson*, and between both of them and *Kass* in the belief that the hard core idea of insularity which underlies all of these situations will best be perceived from the differing viewpoints provided by formal differences.

Expulsion and Exclusion in Government of Urban Milk Markets

The essential point of difference between *Lehigh* and *Lawson* is that in *Lehigh* the penalty payment provisions operate affirmatively so as to *force out* of the protected market the retail milk dealer primarily associated with the neighboring market. In the *Lawson* case the penalty payment provisions operated nega-

tively, to *keep out* competition from neighboring retail milk distributors. It is suggested that *Lawson* is the more typical case and represents a more effective trade barrier because only the most determined maverick in the milk industry would ever seek to expand into such a market. In this connection, the teaching of the late Walton Hamilton of Yale in "The Politics of Industry," Knopf, 1957, should provide a healthy antidote to any sentimental ideas about the supposedly differing interests of parties regulated and the independence of the agencies regulating them. He uses the milk industry as a refuting example, at page 58:

> "Within the milkshed, inspection became more and more rigid, and more and more irrelevant to the public health. Fewer producers were able to measure up to the standards. In this way an artificial scarcity was created, and a situation emerged in which it was easy to fix prices. Meanwhile a system of collective bargaining between distributors and dairy farmers emerged. During the depression the Federal Government stepped into the picture. Market quotas were assigned to farmers; milk produced in excess of such quotas was sold as surplus. The quotas were in fact passports to a sheltered market. As a result, two quarts of milk identical in quality and from the same source sell at different prices. The one is destined to be sold as fluid milk in a closed local market, and the other as surplus in a competitive national market. Each milkshed has been fitted out with its system of private government.
>
> "Although milk and liquor lie far apart, their regulation presents similar, though different, patterns. . . . The justification for the array of controls is public morals. Yet not only is there tolerance of this vexatious and intricate system of governmental interference; but there is acceptance of it as the means to security and economic salva-

> tion. So firmly entrenched is the scheme of controls that, in fluid milk and liquor, the most radical and tormenting measure which might be taken would be to return the commodities to the free and open market."

Professor Hamilton might well have added a footnote to the power of these oligarchies in the monument to protectionism provided by penalty payment provisions. He would undoubtedly have noted with great interest the names and number of supporters of such protectionism shown by the amici briefs in this case. Nor is he alone in his analysis. Many other authorities are mustered by Anthony Lewis in his article "To Regulate the Regulators" in the February 22, 1959 edition of the New York Times Magazine.

Two Sides to the Penalty Payment "Bargain"

Another point of difference arises out of the fact that the penalty payments provisions in the New York Milk Order under attack in the *Lehigh* case were promulgated in 1957, long after the cruder and less sophisticated Cleveland Order provision, and only after the Cleveland Order provision had been in litigation before the Department of Agriculture for more than four years in the *Lawson* case. This undoubtedly accounts for the "Hobson's choice" provided in the New York Order between what the government is pleased to call "full regulation" and "partial regulation." Just as Hobson gave his customers a choice of the horse which stood nearest the door, so was the New York Order drawn to enforce penalty payments.

One of the major arguments advanced by the Department of Agriculture in the *Lawson* case was that if

"full" regulation had been extended to all retail distributors no matter how small a proportion of their total business was done in the marketing area, the cost to distributors having most of their business in another market would be more expensive to them than the penalty payments. Of course such an argument would justify any kind of regulation, no matter how illegal, so long as it was "cheaper" than the cost of regulations measured by the ultimate reach of government power. But the plausibility of such a "bargain" is a tempting allurement from the plain logic of such a completely lawless "choice" between a cheaper illegal regulation and a more expensive one, colorably legal. Therefore, it might be well to observe that it is a "bargain" for the "insiders" as well. A policy of regulation in accordance with the Congressional mandate—"full" regulation in respondents jargon—would tend to break down the governing oligarchy of the urban market, dissipating its power by extending it too widely. The plain fact which all must admit both in the *Lehigh* case before the Court and in the *Lawson* case is that the prices actually being paid by these "non-pool" handlers from neighboring markets are higher than any of those required to be paid by the regulated "pool" handlers. This is as plain an illustration as can be found for the lack of any good faith purpose in extending "full" regulation to these adjacent areas. It is precisely because the prices these outsiders actually pay for their milk is so greatly in excess of the protected market's Class III or surplus price that the regulations are termed "penalty payments."

Direct Impact of Price Dircrimination Upon Dairy Farmers or "Producers"

Finally it is illuminating to consider the principal point of difference which distinguishes both *Lehigh* and *Lawson* from *Kass*. Both *Lehigh* and *Lawson* are retail milk dealers who have their own producers, or dairy farms, so that whatever milk they sell in the protected marketing area is milk bought directly from farmers. In *Kass* v. *Brannan* the milk sold in the marketing area was not bought directly from farmers or producers, but indirectly through a wholesale milk dealer.

Section 8c(5)(A) provides for the classification of milk in accordance with its use and fixing "minimum prices for each such use classification which all handlers shall pay . . . . for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers . . ." The majority in *Kass* gave primary emphasis to the twice repeated "all handlers" part of this price uniformity provision, and applied it to both direct and indirect milk purchases from producers. The dissent reversed the order of emphasis of the majority. Price uniformity among handlers was only required in the case of milk purchased directly from producers, and was not required of indirect purchases through other handlers.

The District Judge in *Lawson* succinctly sums up the dissent in *Kass:* "Section 8c(5)(A) makes no reference to the fixing of minimum prices which handlers shall pay to handlers." He then extends the principle of the dissent to *Lawson*, saying: ". . . Minimum class prices authorized by Section 8c(5)(A) of the Act . . . apply only to classified milk, i.e.—milk purchased from producers. During the period in question plaintiff

made no purchases from 'producers' as that term is defined by Order No. 75 . . ." which excludes farmers shipping to non-pool plants. Careful note should be taken that the principle of the dissent in *Kass* must be extended to reach *Lawson* and *Lehigh*. The *Kass* dissent merely asserted that "milk purchased from producers . . ." did not include indirect purchases from farmers through dealers. Here *Lawson* and *Lehigh* purchased direct from "producers, i.e.—dairy farmers" but the order definition of "producers" did not include them.

Thus, while it is clear that the majority opinion in *Kass* is broad enough to cover the *Lawson* and *Lehigh* cases, the dissent is not. Learned Hand is willing to suspend the requirement of price uniformity among all handlers in purchases from other handlers. Is he willing to suspend it in purchases from different classes of producers? More particularly, is he willing to suspend it as to new producers coming into the market? This subject is hardly within the scope of his dissent.

More particularly opposed to this view of distinguishing between producers is Section 8c(5)(D). In speaking of this subsection, the Senate Report (No. 1011, 74th Cong. 1st Session) says at page 11, as does the Conference Report (House No. 1757) at page 21:

> "To prevent the destruction of the minimum price schedules which may be fixed in an order, handlers subject to it may be required to pay, for a period of 90 days, a price fixed for milk classified for manufacturing purposes to producers not theretofore selling milk for consumption in the area covered by the order. This time limitation is designed to prevent assaults upon the price structure by the sporadic importation of milk from new producing areas, while permitting the orderly and natural ex-

pansion of the area supplying any market by the introduction of new producers or new producing areas. This is the only limitation upon the entry of new producers—wherever located—into a market, and it can remain effective only for the specified 90-day period."

Plainly no retail milk dealer can make "sporadic" assaults on a market, his business being most largely dependent on building up a retail trade from day to day. Plainly adjacent retail dealers are not ever buying inspected milk at anything approaching a Class III price. Plainly also, penalty payment provisions do not end after a three months period. It necessarily follows therefore that the limited deterrent provided by Section 8c(5)(D) has been extended beyond the bounds of all reason, without even making reference to it, but relying instead on the "tailpipe" of Section 8c(7)(D). Cf. *Brannan* v. *Stark*, 342 U.S. 451, 453. The "tailpipe" cannot stand the weight of so heavy a monument to protectionism as this.

CONCLUSION

The delegation of authority in the Agricultural Marketing Agreements Act of 1937 is extremely narrow and carefully restricted. This is not simply because of the direct influence *Schecter* v. *U. S.*, 295 US 495, had on its original enactment, but is also the result of important policy considerations in the grant of legislative sanction to monopoly pricing practices and exemption from the anti-trust laws. This is seen in the circumstance that although the act has been frequently amended, its rare specificity has never been relaxed. One such detailed amendment was made in Sections 8c(5) and (7) after the narrow construction of these

provisions in *Brannan* v. *Stark* (1952), 342 U.S. 351, and *Kass* v. *Brannan* (1952), 196 F. 2d 791. This Act of August 28, 1954, c. 1041, Title IV, Section 401(b)-(d), 68 Stat. 907, made no change in the language construed. The Court should not permit an extension of monopoly power which Congress has thus so long withheld.

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